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No. 80-2025

SUPREME COURT OF THE UNITED STATES

October Term 1980

JACK BENTIVEGNA,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

Question I

Whether powerfully incriminating co-conspiratorial statements were admitted into evidence without independent proof of the conspiracy ?

Question II

Whether there was sufficient evidence that the York County Democratic Committee authorized any agent to commit an unlawful act; and if not, whether the York County Democratic Committee and Jack Bentivegna were improperly, unfairly and illegally convicted of conspiracy ?

Question III

Whether the Government in its rebuttal closing made improper and prejudicial reference to the defense failure to call unindicted co-conspirator Don Paule and other witnesses ?

Question IV

Whether there was sufficient evidence that Jack Bentivegna induced fear of economic loss or acted under color of official right within the meaning of the Hobbs Act ?

LIST OF ALL PARTIES

The parties to the proceeding are: (1) the United States of America, by and through the U.S. Attorney for the Middle District, Carlon O'Malley, prosecutor in the Court below and Respondent herein; and (2) Jack Bentivegna, defendant in the Court below, and Petitioner herein; and (3) the York County Democratic Committee, defendant in the Court below, and Petitioner to the Third Circuit Court of Appeal, but this party has not petitioned the United States Supreme Court for Certiorari.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
LIST OF ALL PARTIES i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
REFERENCE TO OPINIONS BELOW 1
JURISDICTION 1
STATUTES INVOLVED 1
STATEMENT OF THE CASE 3
REASONS FOR ALLOWANCE OF WRIT 5
CONCLUSION 20
APPENDIX:
Judgment Order of the United States Court of Appeals for the Third Circuit A1
Order of Judge Muir dated November 3, 1980 denying Motion of Jack Bentivegna and Motion of York County Democratic Committee for a Judgment of Acquittal or in the alternative for a New Trial A3
Memorandum or Opinion of the trial Court Expressed on the Record (See Vol. 5, page 235) A7
Pertinent Notes of Testimony (Transcript of Trial Proceedings) (Vol. 3, page 122 and 123) A8
Vol. 5, Page 148 and 149 Mr. Martin/Rebuttal Closing A9
Vol. 5, Page 229 through 235 Mr. Costopoulos at Sidebar A11

TABLE OF AUTHORITIES

CASES: Page

Anderson v. United States, 417 U.S. 211 (1974)..... 10

Commonwealth v. Domanski, 322 Mass 66, 123 NE2d 368 (1954) 17

Critzer v. Shegogue, 236 MD. 411 204 A.2d 180 (1964) 19

Ford v. United States, (CA5 Tex) 210 F.2d 313 (1954) 17

Glasser v. United States, 315 U.S. 60, 75 (1942)..... 9, 10

Grady v. Collins Transp. Co., 341 Mass. 502, 170 NE2d 725 (1960) 19

Graves v. United States, 150 U.S. 118, 37 L.Ed 1021, 15 S.Ct. 40 (1893) 17, 19

Llewellyn v. Cincinnati Street R. Co., 66 Ohio App 107, 19 Ohio Ops 360, 32 Ohio L abs 153 32 NE2d 33 (1940) 19

United States v. Beh, 437 F.2d, 188 (1971) 9

United States v. Cryan, Lerner, Leonardis, and Neri, United States District Court of New Jersey (decided May 22, 1980) 12

United States v. DiRe, 332 U.S. 581, 92 LEd. 210, 68 S.Ct. 222 (1948) 17, 19

United States v. Geaney, 417 F.2d 116, (2d Cir. 1969), cert. denied, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970) 9

United States v. James, 590 F.2d 575 (5th Cir. 1979) 9, 10

United States v. Pipia, 560 F.2d 827, 835 (7th Cir. 1977) 10

United States v. Trowery, 542 F.2d 623 (1976) ... 9, 10, A5

REFERENCE TO OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, dated April 1, 1981, is reproduced in the Appendix at Page A 1 . The Order of the United States District Court denying the Motion of Jack Bentivegna and Motion of the York County Democratic Committee for a Judgment of Acquittal or, in the alternative, for a New Trial, dated November 3, 1981, is reproduced in the Appendix at Page A 3.

JURISDICTION

This appeal is brought pursuant to 28 U.S.C.A. § 1254 (1) and Rule 17 of the Rules of this Court. The appeal is from the judgment of the United States Court of Appeals for the Third Circuit rendered on April 1, 1980 in the case of *United States vs. York County Democratic Committee; Jack Bentivegna*, docketed at No. 80-2530. The United States District Court for the Middle District of Pennsylvania had jurisdiction because violations of federal criminal laws, specifically 18 U.S.C. § 1951 and § 2 were alleged to have been committed within the jurisdiction of the Middle District of Pennsylvania.

STATUTES INVOLVED

This case involves the following federal statutes:
18 U.S.C.A. § 1951:

> **Interference with commerce by threats or violence**
> (a) *Whoever* in any way or degree obstructs, delays, or *affects commerce* or the movement of any article or commodity in commerce, *by* robbery or *extortion* or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term *"extortion" means the obtaining of property from another, with his consent, induced by* wrongful use of actual or threatened force, violence, or *fear, or under color of official right.*

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15 [15 USCS § 17], sections 52, 10-105, 151-166 of Title 29 or sections 151-188 of Title 45 [45USCS § § 151-188].

(June 25, 1948, ch 645, § 1, 62 Stat. 793.)

18 U.S.C.A. § 2:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

As amended Oct. 31, 1951, c. 655, § 17b 65 Stat. 717.

STATEMENT OF THE CASE

On March 28, 1980, a Grand Jury for the Middle District of Pennsylvania returned an indictment charging the defendants, Carroll Leppo, the York County Democratic Committee, and Jack Bentivegna, with violations of the Hobbs Act, 18 U.S.C. § 1951 and § 2. Defendant Carroll Leppo was granted a severance and was therefore tried separately. [1] The York County Democratic Committee and Jack Bentivegna were tried together.

The trial of Jack Bentivegna and the York County Democratic Committee began on June 20, 1980 and ended on the same day in a mistrial when jurors had read newspaper accounts in the jury room of the related Leppo trial.

The retrial of Jack Bentivegna and the York County Democratic Committee began on August 12, 1980 and continued on August 14, 18, 19, 20 and 21 before the Honorable Judge Malcolm Muir, with a jury. The trial took place in Lewisburg, Middle District, Pennsylvania. The jury found both defendants guilty of conspiracy to extort and not guilty of extortion on August 21, 1980. Jack Bentivegna was sentenced by Judge Muir on September 19, 1980; a two year suspended sentence and a $5,000.00 fine was imposed. The York County Democratic Committee was also sentenced by Judge Muir on Septemer 19, 1980; a $250.00 fine was imposed.

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[1] Carroll Leppo was a County Commissioner of York at the time in question. The allegations against Carroll Leppo were unrelated to those brought against Jack Bentivegna and the York County Democratic Committee and for that reason Judge Muir granted the severance.

On August 27 and August 28, 1980, the York County Democratic Committee and Jack Bentivegna filed motions and briefs for an order directing the entry of a judgment of acquittal, or in the alternative, for a new trial, raising the same issues set forth herein. Defendants' motions were denied on November 3 1980 by the Honorable Judge Malcolm Muir.

A general review of the facts of this case will reveal the following: Briefly stated, the defendants were charged and convicted of conspiracy to extort money from the architectural firm of Williams, Shields, Snyder & Goas. The architectural firm at the time in question was seeking a contract with York County to design a new prison. Jack Bentivegna was the Finance Chairman of the York County Democratic Committee. Robert Bowers was a County Commissioner of York County at the time in question, and Donald Paule was Chairman of the York County Democratic Committee at the time in question. Bowers and Paule were unindicted co-conspirators.

The chief Government witness was Charles S. Warner, a partner of the architectural firm allegedly victimized, who testified at great length about conversations he had with unindicted co-conspirator Robert Bowers; he testified at great length and in detail to conversations he had with unindicted co-conspirator Don Paule; and he testified to conversations he had with defendant Jack Bentivegna; and in essence, testified that Jack Bentivegna and he (Warner) met in Bentivegna's basement at which time Bentivegna asked for $2,000.00 cash immediately, $1,000.00 cash later, and five percent (5%) of the fee the architectural firm would get to design the York County Prison, which would go to the York County Democratic Committee. Pursuant to the meeting with Jack Bentivegna, according to Warner, Warner delivered to Jack Bentivegna $2,000.00 one night, thus the extortion charge which resulted in the acquittal.

The Government also called unindicted co-conspirator Robert Bowers who stressed that he had no knowledge of any wrong-doing by Jack Bentivegna. The Government did not call unindicted co-conspirator Don Paule.

Jack Bentivegna testified, and he flatly denied ever meeting Warner in his basement or ever having any conversation with Warner other than to ask him if he would buy tickets to a dinner. Jace Bentivegna was the only defense witness called.

In the closing argument the defense referred to the Government's failure to call unindicted co-conspirator Don Paule, arguing that an inference may be raised that Paule's testimony would not have supported the Government's case. The prosecution, over objection by defense counsel, and knowing that Don Paule had a conviction for false swearing, and knowing that the defense did not have the power to immunize that witness, stressed in its rebuttal closing that the defense failure to call Don Paule gave rise to the permissible inference that Don Paule's testimony would not have helped Jack Bentivegna when in fact it would have.

Appellant Jack Bentivegna and Appellant York County Democratic Committee appealed their convictions to the Third Circuit Court of Appeals, and the judgments were affirmed by that Court on April 1, 1981.

REASONS FOR ALLOWANCE OF WRIT

Question I.

Jack Bentivegna was charged with having conspired with the York County Democratic Committee, Robert Bowers (a York County Commissioner at the time in question), and Don Paule (the York County Democratic Chairman at the time in question). The co-conspirators allegedly tried to extort money from Charles S. Warner, a partner in the architectural firm that was allegedly victimized, by demanding $2,000.00 to $3,000.00 cash and five percent (5%) of the fee that the Warner architectural firm was to get, all in exchange for the awarding of the contract to the architectural firm for the construction of the York County Prison.[2]

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[2]The contract was to be awarded by the County Commissioners of York

Charles S. Warner was the key Government witness. Charles S. Warner's testimony, which referred to conversations he had with Bowers and Paule, was admitted over strenuous objection by the defense. The Court admitted the hearsay testimony of Bowers and Paule with the understanding that the Government would present independent proof of the conspiracy at a later time, which the Government failed to do.

Charles Warner testified that Robert Bowers initially approached him and demanded the sums heretofore mentioned in exchange for the contract for the York County Prison.[3] Warner also testified that on a subsequent occasion that he (Warner) mentioned these figures to Robert Bowers and told Robert Bowers he would not go along with it. It is to be noted that Robert Bowers, under a grant of immunity from the Government, and as an unindicted co-conspirator, testified for the Government. Robert Bowers denied these statements attributed to him by Charles Warner. Robert Bowers testified that he never mentioned to Warner a cash contribution in the nature of $2,000.00 and five percent (5%) of the fee. (See Appendix, page A 8). Robert Bowers also testified that having known Charles Warner most of his life that Warner would say anything if threatened by prosecution or losing his occupation. (See Appendix, page A 9). Robert Bowers further testified that a contribution to the York County Democratic Party was discussed, and that if Charles Warner was interested in making

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[3] According to Warner, he thereafter received a call from Jack Bentivegna and met with Bentivegna at his house, at which time Bentivegna mentioned these same figures for the contract. Bentivegna denied that this meeting ever took place and that the first time he met Warner was at the luncheon with Don Paule.

a contribution that the Finance Chairman (Jack Bentivegna) would contact him to discuss a contribution. It is to be noted, however, that Robert Bowers *never* talked to Jack Bentivegna about this or any other matter. No testimony was presented by the Government to the contrary.

As to what Don Paule said to Charles Warner, Charles Warner testified that Don Paule and Jack Bentivegna met him at a restaurant in the Harrisburg area and that Don Paule demanded cash and five percent (5%) of the contract and threatened that Warner would lose the contract if he did not honor these demands. Jack Bentivegna was present at this luncheon and participated in this conversation.

Charles Warner was not the only witness that referred to out of court declarations allegedly made by Don Paule. The Court also permitted Robert Bowers to testify to conversations he had with Don Paule. According to Robert Bowers, Don Paule told him to tell Warner that Jack Bentivegna would be calling Warner to request a contribution. That's why Robert Bowers, never having talked to Jack Bentivegna, told Warner that Jack Bentivegna would be contacting him to discuss a contribution. On that occasion (the occasion that Don Paule told Robert Bowers that Jack Bentivegna would be contacting Warner), Don Paule also told Robert Bowers that it was customary for contractors at the state level to pay percentages for contracts awarded at the state level. Not only was Jack Bentivegna not present during any discussion between Don Paule and Robert Bowers, Jack Bentivegna's testimony was that he never even heard the word 'percentage' mentioned by anyone for any reason.

Jack Bentivegna testified on his own behalf. He stressed, as did Robert Bowers, that the two of them (Bentivegna and Bowers) *never* discussed, or met, or mentioned to each other the Warner contribution or contract. Never.

According to Jack Bentivegna, on a certain day Don Paule asked him to call one Charles Warner to see if Charles Warner would buy tickets to an upcoming Democratic fund-raising

dinner. Jack Bentivegna was the Finance Chairman in charge of selling dinner tickets and he did not think this request was unusual, and called Charles Warner as requested by Don Paule. When this call was made, according to Jack Bentivegna, Warner asked to have lunch with Don Paule, and thereafter there was a luncheon. Warner and Don Paule and Jack Bentivegna met at a restaurant in Harrisburg at Warner's request. According to Jack Bentivegna, Don Paule did all the talking and the discussion between Paule and Warner was very light and a contribution to the party was a topic of discussion between Paule and Warner. Bentivegna stressed that Don Paule did not demand any monies or mention a specific figure or threaten Warner with losing the contract in any way. That was Bentivegna's testimony. That was the Government's case. No independent evidence of a conspiracy was ever introduced by the Government.

It is to be noted and emphasized that Don Paule was a subpoenaed Government witness. He was an unindicted co-conspirator. He had been granted immunity, and though he was the link to Jack Bentivegna, Don Paule was not called to testify by the Government. The Government elected to proceed on the hearsay accounts of Charles Warner.

The Government took the position that the independent proof of a conspiracy was the chronology of events. The trial judge adopted this theory. The chronology of events referred to is that Robert Bowers told Charles Warner that Jack Bentivegna would call him, and Jack Bentivegna did call him.[4] Jack Bentivegna and Don Paule and Charles Warner thereafter had lunch. Basically, the Government argues that this was the independent proof of a conspiracy. It is respectfully submitted to this Honorable Court that this theory is untenable and flies in

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[4]Warner testified that when Bentivegna called, he (Bentivegna) invited him to his (Bentivegna's) house. See foot note [3]. Bentivegna testified that such a call and meeting never took place and that the first time he called Warner, Warner wanted to have lunch with Don Paule and him (Bentivegna).

the face of the spirit and intent, and blackletter law, of what must be shown to justify out of court declarations on the basis that they were co-conspiratorial statements.

Independent proof of a conspiracy must be established by a preponderance of the evidence to the satisfaction of the Court before co-conspiratorial statements are admissible. In *United States v. Trowery*, 542 F.2d 623 (1976) the Third Circuit Court of Appeals articulated the rationale behind this rule citing this Court's opinion in *Glasser v. United States*, 314 U.S. 60, 75 (1942), for the proposition that:

> "The common enterprise cannot be established solely by the words of the self-proclaimed participant, since 'otherwise' hearsay would lift itself by its own bootstraps to the level of competent evidence.' "

The Court then states that "there must be a clear preponderance of evidence *independent of the hearsay statement* to satisfy the judge that the declarant was a participant (emphasis added). *United States v. Beh*, 437 F.2d 188. There is, in addition, compelling federal case law which stands for the proposition that the independent proof should be established before the jury is allowed to hear the alleged co-conspiratorial statements because of the irreparable prejudice in letting such statements in first. See *United States v. James*, 590 F.2d 575 (5th Cir. 1979).

The Court in *Trowery* clearly indicated that it is the Court's duty to find that such conspiratorial statements are competent, and in doing so, it is the Court's duty . . .

> ". . . to determine whether the evidence is competent as against the nondeclarant, the trial judge determines whether it has been proved, by a preponderance of the evidence, that a joint undertaking existed at the time of the statement of action. *United States v. Geaney*, 417 F.2d 116 (2d 116 (2d Cir. 1969), cert. denied, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970). No lesser burden of proof would be satisfactory since the defendant does not have the opportunity to cross examine the declarant . . ."

At the trial, Judge Muir reluctantly allowed the Government to present evidence purported to be statements "in furtherance of and during the course of" the conspiracy. Purported statements of this nature came in every day during the trial despite the fact that no independent evidence of a conspiracy was offered by the prosecution.

What independent proof of the conspiracy did the Government present? The Government argued the chronology of events, but the chronology of events was only incriminating because of the hearsay admitted in the first place. The Government argued that Bentivegna's comments to Charles Warner were independent proof of the conspiracy because Bentivegna referred to statements Warner attributed to Bowers. The statements Warner attributed to Bowers were material hearsay statements objected to and classic boot-strapping, not to mention the fact that Bowers denied ever having made such statements to Warner.

And finally, and most importantly, what independent proof did the Government present to show that Don Paule was a member of the conspiracy? It must be kept in mind that Don Paule was the Government's link to Jack Bentivegna. The answer is that there was none whatsoever.

Since the Government did not present any independent proof of the conspiracy, the co-conspiratorial statements should have been stricken from the record in accordance with this Court's decision in *Glasser v. United States*, 315 U.S. 60, 75 (1942) and *Anderson v. United States*, 417 U.S. 211 (1974); and the other Federal Courts in *U.S. v. Pipia*, 560 F.2d 827, 835 (7th Cir. 1977), *U.S. v. James*, 590 F.2d 575 (5th Cir. 1979); and by the Third Circuit Court of Appeals in *U.S. v. Trowery*, 542 F.2d 623 (1976).

And finally, how could these alleged hearsay statements be attributed to the York County Democratic Committee?

The contention in this instance is the decision below conflicts with decisions of this Court. Probable jurisdiction should be noted.

Question II

Initially, it should be noted and emphasized that the York County Democratic Committee is nothing more than an association of persons organized to support the principles of the Democratic party in York County and that it has no ability to act or to authorize any action without the individual members of the association authorizing such action by majority vote. No evidence was presented by the Government to show that the York County Democratic Committee ever authorized anyone to do an unlawful act on its behalf, or to do lawful acts in an unlawful manner, or that it had known of any such conduct by anyone. On the contrary, the Government's witnesses made it manifestly clear that the Committee did nothing more than have one or two meetings during the period in question to discuss candidates and the election of its officers.

To be convicted of a conspiracy, one must, by his word or actions, objectively manifest an agreement to participate, directly or indirectly, in the affairs of a criminal enterprise. This is the law of conspiracy and is fundamental, and it applies to entities, partnerships, corporations, as well as individuals.[5]

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[5]Though there are no federal statutes on point, the Commonwealth of Pennsylvania does have a statute that deals with the culpability of unincorporated associations which is set forth at 18 P.S. 307 (c) (1) and (2):

> (c) Unincorporated association. An unincorporated association may be convicted of the commission of an offense if:
>
> (1) the offense is defined by a statute other than this title which expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designated the agents for whose conduct the association is accountable of the circumstances under which it is accountable, such provisions shall apply; or
>
> (2) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

It is respectfully submitted that this statute is intended to prevent prosecutions like the prosecution of the York County Democratic Committee in the instant case.

In the most recent case of *United States v. Cryan, Lerner, Leonardis, and Neri,* decided by the United States District Court of New Jersey, on May 22, 1980, the Court held that RICO (Racketeer Influenced and Corrupt Organizations Act) did not change the substantive law of conspiracy to the extent that individuals could be charged with each others' actions merely because they were employees of a single governmental unit. There, the government charged that four high-ranking officials in the Sheriff's Office of Essex County and the Chairman of the Democratic Party of Essex County had used the power and color of their office to extort money from Sheriff's Office employees. Under RICO the Government contended that "an enterprise" of long-standing had existed among members of the Sheriff's Office to accept annual payments from employees as a condition for receiving salary increases, promotions, and other benefits.

In the *Cryan* case (supra) the government argued that the federal statute there, RICO, was intended to impute the criminal liability of individuals because they were employed by the same "enterprise". The Court noted there that "This theory confuses two concepts" the substantive crime of conspiracy, and the imputation of criminal liability to co-conspirators based on principles of agency. And the Court went on to hold:

> ". . . the fact that RICO may be violated by the systematic extraction of money from employees during the finite period *does not convert the Sheriff's Office as an entity into a criminal organization.* (emphasis added) . . ."

Theoretically, co-conspirators, because they act pursuant to a common plan, are partners. As such, each partner is both an agent of each other and other partners of the partnership. Under the rules of agency, each partner is authorized to act within the scope of the partnership agreement and every partner is responsible for all authorized acts. In the instant case, there was no evidence whatsoever of any common plans; consequently, there was no fictional agreement. The natural consequence of this lack of an agreement is that there were no acts, authorized or unauthorized, which would derive from such

an agreement. In a criminal case, the jury must determine that there was a partnership, a partnership in crime, and this determination requires proof beyond a reasonable doubt. There was no proof at all in the instant case of such a partnership, nor of the parameters of any alleged agreement.

The Court in *Cryan* (supra) held that "it (RICO) may not and does not change the fundamental principle that an individual may not be convicted on the basis of another person's action which he neither authorized nor adopted." The York County Democratic Committee, as an entity, could not be convicted either on the basis of another person's actions which the Committee neither authorized nor adopted. There had not been a scintilla of evidence presented by the Government to show that the Committee authorized or adopted anyone's actions, and to have sustained the conviction of conspiracy as to the York County Democratic Committee in the instant case, in light of the evidence presented, was unconscionable.

Ergo, the conviction of Jack Bentivegna can not stand because one can not conspire with himself.

It is true that the jury could have concluded that Jack Bentivegna conspired with either Robert Bowers or Don Paule, or both, to violate the Hobbs Act. But when the verdict was rendered in the instant case, defense counsel for Jack Bentivegna made the following effort to determine whether the foregoing (a conspiracy between Jack Bentivegna and either Robert Bowers or Don Paule) took place. This colloquy took place and can be found at Vol. 5, page 229-235:

> MR. COSTOPOULOS: May we approach the bench?
>
> THE COURT: Yes, sir.
>
> (At sidebar)
>
> MR. COSTOPOULOS: May it please the Court, on behalf of Jack Bentivegna, I am satisfied with the Court's poll of the jury. At this time, however, because of the co-conspiratorial admissions that have been admitted into evidence and a charge of the Court given to this jury that they could only use admissions of certain

unindicted co-conspirators, if they found that there was a conspiracy. I, on behalf of Jack Bentivegna, do not know who this jury concluded Mr. Jack Bentivegna conspired with. It is possible, Your Honor, this jury individually and/or collectively will indicate to the Court that the only person or entity Jack Bentivegna conspired with was the York County Democratic Committee. On appeal, should the Committee be excluded as a Defendant for any reason, unless we have that indication from the jury on the record, we may be in a position with the jury has found a man guilty of conspiracy for having conspired with himself.

In addition, the jury may conclude that Jack Bentivegna conspired with an unindicted co-conspirator which would forever foreclose that appellate problem that we may have to face.

THE COURT: Which would forever what?

MR. COSTOPOULOS: Foreclose the appellate problem I anticipate happening in the future. For example, Judge, if on appeal the Third Circuit says the York County Democratic Committee should never have been indicted, for whatever reason, then what we have on the record is a conspiracy conviction not knowing whether Jack Bentivegna was found to have conspired with the Committee alone or with the unindicted co-conspirator, Don Paule, and/or the unindicted co-conspirator, Bob Bowers. For that reason, we can do it individually, sequestering the other eleven would be my request, to ask these jurors the following question: With whom did Jack Bentivegna conspire in this case. And whatever answer they give, of course, is the final word in this matter and I would have no further requests.

MR. MARTIN: Your Honor, I object to that simply because we are into the area of special verdict questions for the jury. Your Honor's charge indicated that the conspiracy would have to exist between two people, and Your Honor also referenced that the York County Democratic Committee was an unincorporated association. It could only act through individuals. And I think,

first of all, the time to have brought up this problem was – if at all –was in the instructions to the jury and it certainly is not at this point a proper thing to have special verdict questions of the jury in this regard.

I think Mr. Costopoulos's request should be denied.

THE COURT: I'm not aware that we can ask them any special verdict questions which this really amounts to. I have never known of it being done. It seems to me I saw something relating to this in the last six months, but I believe that if it was done, it was something done at the outset of the jury deliberation and not coming in at this juncture. And I really don't think we have the power to do it. Now, do you know of anything which would give us the power to do this?

MR. COSTOPOULOS: I cannot cite to this Court a case, but the problem as I see it, Judge, is, suppose on appeal the Third Circuit says the York County Democratic Committee should never have been indicted. We don't know what transpired in that jury room. We have invested, I don't know how many days in this trial –

THE COURT: Five.

MR. COSTOPOULOS: Five. The jurors may indeed say that he conspired with all of the named conspirators indicted, and unindicted, in the indictment and it would be a proper verdict. But if this jury answers individually and/or collectively, that they found that he conspired with the Committee, and the Third Circuit says the Committee should not have been indicted, then Jack Bentivegna's conviction, of course, must fall and it is unique, but so was the indictment of the Committee.

THE COURT: I am not saying we are going to do this, but I would be more inclined to ask them this question: Did Mr. Bentivegna conspire with anybody other than the York County Democratic Committee? If they say yes, so be it. If they say no, then you've got a conspiracy, perhaps, with himself, but that bothers me because even that question is somewhat flawed because he could have conspired with somebody as agent for the Committee, I

believe, and then they would give us – they might answer that question, he conspired with the Committee, thinking that if he conspired with an agent of the Committee, that's good enough.

I'm very much troubled by it.

MR. COSTOPOULOS: I do think the Court can ask a structured question that can be answered with a yes or no, as the Court is attempting to do. And I do think we're moving in the right direction, Judge, with that. The Court may ask, did Jack Bentivegna conspire with unindicted co-conspirator Don Paule and/or Robert Bowers?

THE COURT: Well, is there anybody else he could have conspired with?

MR. COSTOUPOLOS: The only other person he could have conspired with would have been on the face of the indictment, the Committee or its agents. The indictment simply names those two unindicted co-conspirators, and the Committee. And if you would ask that leading question, which I am not objecting to at all, because I can appreciate the Court's sensitivity in this area, I do think the record will be complete in the eventuality the Committee is ultimately exonerated.

THE COURT: Well, there's a possibility we could send out a special verdict question with them, or to them, which would require all these signatures. Of course, it's now midnight. I'm reluctant to try to do that at this late hour and I somewhat hate to have them come back tomorrow when I think they have served here, trying to reach a verdict to dispose of this matter tonight.

Do you know anything about the law in this field, Mr. Martin?

MR. MARTIN: No, Your Honor, but again, the Government – this is no surprise thing that has arisen. This is something that could have been anticipated and now, after the verdict comes in, that I believe is the wrong time to be raising the problem. It should have been raised before the jury went out. Clarification of the jury

instructions or some other manner – at this time, I don't think it's proper to – the juror's thoughts on this matter, and I'm afraid I don't know about the special verdict questions, Your Honor.

THE COURT: All right. Well, I'm going to decline to do it. I think that if the Court of Appeals decides that the York County Democratic Committee should never have been indicted here, then they can really drop this case so we don't try it again. That may be my feeling and they may well see their way clear to do that.

MR. NOLL: I would have the same motion made and understand that the ruling would be the same.

THE COURT: Sure.

Thus, the Court made it clear that if the conspiracy count against the York County Democratic Committee should never have been brought, then the Third Circuit Court should "really drop this case" against Jack Bentivegna in light of the existing record.

The contention in this instance is there was insufficient evidence to support a verdict for each of the defendants and accordingly, Appellant Jack Bentivegna and Appellant York County Democratic Committee should have been granted a Judgment of Acquittal notwithstanding the verdict. The questions presented by this appeal are substantial and of broad public importance. The case is one of first impression. It is respectfully submitted that probable jurisdiction should be noted.

Question III.

The defense for Jack Bentivegna made reference to the Government's failure to call unindicted co-conspirator Don Paule who was the Government's link to Jack Bentivegna.[6] The

[6] *Graves v. United States*, 150 U.S. 118, 37 L.Ed 1021, 15 S.Ct. 40; *Ford v. United States* (CA5 Tex) 210 F.2d 313; *Commonwealth v. Domanski*, 332 Mass 66, 123 NE2d 368 (1954).

Where one with knowledge of the facts, not called by the prosecution as a witness in a criminal case, is not shown to be unavailable, it must be assumed that his testimony would not have been helpful to the prosecution. *United States v. DiRe*, 332 US 581, 92 L.Ed 210, 68 S.Ct. 222 (1948).

defense argued that the Government's failure to do so gave rise to the permissible inference that his testimony would not have been favorable to the Government. The defense for Jack Bentivegna also argued that the same inference could be drawn because the Government failed to call two other partners in the firm, Williams and Goas.

The Government, thereafter, in its rebuttal closing, over objection, argued that the defense also had the subpoena power to call Don Paule and any other witnesses that the Government failed to call. This reference to the defense subpoena power was a patent abuse of rebuttal closing and a reference that flies in the face of the defense right to present no testimony.[7]

Allowing comment on the failure of a defendant to call witnesses is to be viewed with a strict regard for the rights of persons accused. If an inference is based upon the absence of a possible witness, it must appear that the witness is in the

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[7]At page 148 of Vol. 5 the prosecutor made this comment:

> . . . Now, the third thing he (counsel for Jack Bentivegna) (added) raised was the business of Mr. Paule the unknown person or the absent person here in the Courtroom. Mr. Paule is not a Defendant. There's no reason for him to be here.
>
> . . . the defense, of course, has no obligation to put on any defense whatsoever. But, Mr. Bentivegna took the stand. Both sides, the Government and the defense have subpoena power. They can require people to come in and testify.
> At 149.
>
> As I said, both sides have an opportunity to subpoena people. Mr. Costopoulos said you must infer from Mr. Paule's absence that he would have testified favorably. Do your inferences – draw your inferences from the facts, not what I say, not what Mr. Costopoulos says, not what Mr. Noll says. Again, Mr. Paule is not here, but what is the relationship between Mr. Paul and Mr. Bentivegna? Do you recall Mr. Bentivegna's testimony of how they engaged in the business relationship? How he was his adopted son? Those matters.
>
> If Mr. Williams and Mr. Shields – or, excuse me – if Mr. Williams and Mr. Snyder had similar contradictions with Mr. Warner's testimony, wouldn't the defense have had the opportunity to bring them?

"control of the party and available".[8] All witnesses referred to by the Government in its rebuttal closing that the defense failed to call (Paule, Williams and Goas) were outside the control of Jack Bentivegna because the defense does not have the power to immunize witnesses. The Government knew why the defense did not call Don Paule and the defense reasons were reasonable and proper and no inference that the testimony would have been unfavorable was permissible comment.[9]

Finally, it is to be noted and stressed that the York County Democratic Committee was also prejudiced by the remarks of the prosecutor since they rested solely on the weakness of the Government's case and presented no testimony whatsoever.

The contention in this instance is that the judgment of the Third Circuit on this question is in direct conflict with this Court's opinions in *Graves vs. United States*, and *United States vs. DiRe*, and cannot be sustained.

Question IV.

Even assuming the credibility of Charles S. Warner beyond a reasonable doubt (something the jury refused to do), Charles S. Warner made it clear that the inducement of fear of economic loss, or the acting under color of official right, did not come from Jack Bentivegna himself. According to Warner, he was concerned about Jack Bentivegna because of Jack Bentivegna's reputation and because of Jack Bentivegna's job at Penn Dot. Jack Bentivegna himself did not induce the fear, nor did he represent himself as having acted under color of official right. The charges brought were criminal charges and the mens rea of the defendant is a key issue and element the Government failed to prove in the instant case.

The contention in this instance is there was insufficient evidence to support a verdict for each of the defendants and accordingly, Petitioner Jack Bentivegna should have been granted a Judgment of Acquittal notwithstanding the verdict.

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[8] *Grady v. Collins Transp. Co.* 341 Mass 502, 170 NE2d 725 (1960); *Llewellyn v. Cincinnati Street R. Co.* 66 Ohio App. 107, 19 Ohio Ops. 360, 32 Ohio Labs 153, 32 NE2d 33 (1940).

[9] *Critzer v. Shegogue*, 236 Md 411, 204 A.2d 180 (1964).

CONCLUSION

The Supreme Court of the United States has ruled that independent proof of a conspiracy must be established by a preponderance of the evidence to the satisfaction of the Court before co-conspiratorial statements are admissible. In the instant case, the government presented absolutely no competent independent proof of the alleged conspiracy. Consequently, the co-conspiratorial statements constituted inadmissible hearsay against both Appellants and should have been stricken from the record.

In addition, no evidence was ever presented by the Government which showed that the York County Democratic Committee ever authorized anyone to do an unlawful act on its behalf, or to do lawful acts in an unlawful manner, or that it had known of any such conduct by anyone. To be convicted of conspiracy, one must, by his words or actions, objectively manifest an agreement to participate, directly or indirectly, in the affairs of a criminal enterprise. Thus, the evidence against the York County Democratic Committee was completely insufficient to support the verdict, and that verdict must be set aside. Ergo, the conspiracy of Jack Bentivegna must also be set aside because one cannot conspire with himself; in addition, the Court made it clear that if the conspiracy count against the York County Democratic Committee should never have been brought, then the Third Circuit Court should "really drop this case" against Jack Bentivegna in light of the existing record, which it did not do.

The Government's improper reference in its closing to the defense's failure to call certain witnesses caused irreparable prejudice to the defendant in the District Court trial. This comment on the failure of the defense to call certain witnesses flies in the face of the defense's constitutional right to present no testimony, and was a patent abuse of rebuttal closing.

Finally, there was no evidence whatsoever presented which would show that Jack Bentivegna induced fear of economic loss or that he acted under color of official right. This inducement of fear or the acting under color of official right are key elements of

the Hobbs Act charge which was brought against Jack Bentivegna. Thus, there was insufficient evidence presented to support this verdict since the government must prove each and every element of the offense charged beyond a reasonable doubt.

Wherefore, the Petitioner respectfully requests that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review this case for the reasons stated above, and that this Court reverse Petitioner's conviction.

RESPECTFULLY SUBMITTED:

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COUNSEL OF RECORD FOR
PETITIONER JACK BENTIVEGNA

APPENDIX

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2530

UNITED STATES OF AMERICA

v.

JACK BENTIVEGNA,
Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. No. 80-00034-03)

Argued February 26, 1981
Before: WEIS and GARTH, *Circuit Judges* and Miller.*

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*The Honorable Jack Richard Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that

(1) Co-conspiratorial statements were admitted into evidence without independent proof of the conspiracy and the statements were powerfully incriminating; and

(2) There was no evidence whatsoever that the York County Democratic Committee authorized any agent to commit an unlawful act; therefore, the York County Democratic Committee was improperly, unfairly and illegally convicted of conspiracy; and therefore, the conviction of Jack Bentivegna cannot stand because one cannot conspire with himself; and

(3) The government in its rebuttal closing made improper and prejudicial reference to the defense failure to call unindicted co-conspirator Don Paule and other witnesses; and

(4) There was no evidence that Jack Bentivegna induced fear of economic loss or acted under color of official right and, therefore, the evidence was insufficient to support the verdict, it is

ADJUDGE AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
Weis, *Circuit Judge*

Attest:
Sally Mrvos, *Clerk*

ORDER OF JUDGE MUIR DATED NOVEMBER 3, 1980 DENYING MOTION OF JACK BENTIVEGNA AND MOTION OF YORK COUNTY DEMOCRATIC COMMITTEE FOR A JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
YORK COUNTY DEMOCRATIC COMMITTEE
JACK BENTIVEGNA

Criminal Nos. 80-00034-2
80-00034-3

Judge Muir

ORDER
November 3, 1980

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On August 21, 1980 a jury returned verdicts finding the Defendants guilty of one count of conspiracy in violation of the Hobbs Act, 18 R.S.C. §1951, and acquitting the Defendants of a substantive violation of that act. On August 27 and August 28, 1980, the York County Democratic Committee and Mr. Bentivegna filed motions pursuant to Fed.R.Crim.P. 29(c) and 33 for an order directing the entry of a judgment of acquittal, or in the alternative, for a new trial. Bentivegna filed a brief in support of his motion on September 16, 1980 and the Committee filed a brief in support of its motion on September 19, 1980. The Government filed briefs in opposition to the motions on October 1, 1980. For the reasons that follow, the Defendants' motions will be denied.

Briefly stated, the Defendants were convicted of conspiracy to extort money from the architectural firm of Williams, Shields, Snyder & Goas which at the time was seeking a contract with York County to design a new prison. Bentivegna was the finance chairman of the Committee. Robert Bowers, a county commissioner of York County and Donald Paule, Chairman of the Committee were unindicted co-conspirators.

The Defendants argue that there was no evidence from which the jury could find beyond a reasonable doubt that the Committee conspired to violate the Hobbs Act. If this argument is correct, it follows that the Committee's conviction must be set aside. Bentivegna argues that if the Committee's conviction is set aside, he may not stand convicted of conspiracy. This argument must be rejected because it ignores the possibility that the jury could have concluded that Bentivegna conspired with either Bowers or Paule or both to violate the Hobbs Act.

The Government presented no direct evidence showing that the Committee authorized Paule, its chairman, or Bentivegna, its finance chairman to approach the architectural firm of Williams, Shields, Snyder & Goas to solicit campaign contributions. There was, however, circumstantial evidence sufficient to sustain the Committee's conviction.

That evidence established that the Committee met once a year to elect officers, including the chairman. The chairman had the authority to appoint the finance chairman. It was customary for the chairman and finance chairman, as well as other people, to solicit contributions on behalf of the Committee. In addition, there was evidence that Paule, as chairman of the Committee, entered into a conspiracy with Bowers and Bentivegna to extort money in the form of campaign contributions from the firm of Williams, Shields, Snyder & Goas. From this evidence the jury could find beyond a reasonable doubt that the conduct of Paule and Bentivegna was in their capacity as agents of the Committee and was within the scope of their authority and at least tacitly authorized by the Committee in that the Committee, in effect, delegated such responsibility to those officials. Consequently, the Committee's conviction may not be set aside on the ground

that the Government failed to prove that agents acting on its behalf conspired to violate the Hobbs Act.

The Defendants argue that hearsay declarations of co-conspirators were admitted into evidence without independent proof that a conspiracy existed. Such evidence is inadmissible unless the Government shows by a "clear preponderance of evidence independent of the hearsy statement . . . that the declarant was a participant [in the conspiracy]." *United States vs. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976) (per curiam). The Defendants raised the same argument during trial and the Court concluded that the Government had sustained its burden of showing that the declarants, Bowers and Paule, were participants in a conspiracy with Mr. Bentivegna. Upon review of the arguments in the post-trial briefs, the Court adheres to its conclusion that the hearsay statements of Bowers and Paule were properly admitted.

Bowers testified about a meeting he held with Paule as the result of which Bowers telephoned Charles Warner, a partner in the firm of Williams, Shields, Snyder & Goas, and told Warner that Bentivegna would contact Warner. Warner testified that Bentivegna did in fact call him and that at a subsequent meeting between Warner and Bentivegna, at which no money changed hands, Bentivegna according to Warner, expressed disappointment that Warner did not have any money at that time. Warner testified that at a subsequent meeting among Bentivegna, Paule, and Warner, Bentivegna made statements to the effect that the money given by the architects could be laundered in other cities. In all his dealings with Mr. Warner, Bentivegna indicated he was acting for the Commissioners or the Committee. There was also testimony by Warner that the subject of a payment based on a percentage of the architects' contract with the county was discussed with him by Paule and Bentivegna. Warner also testified that at another time he discussed the same percentages with Bowers.

From this testimony, the Court concluded that the Government had shown by a clear preponderance that Bowers, Paule and Bentivegna had agreed to extort money from the architects.

The key reasons for this conclusion were Bentivegna's call to Warner after Bowers told Warner to repeat a call and the discussions with Warner by Bowers and then by Paule and Bentivegna of payments based on a percentage of the architect's contract. Having found the conspiracy proved by a clear preponderance of independent evidence, the Court's decision to admit into evidence hearsay statements of the conspirators was proper and is not grounds to the entry of a judgment of acquittal or for a new trial.

The Defendants' next argument is that their acquittal of the substantive count is inconsistent with a conviction for conspiracy. This argument is without merit. The crime of conspiracy is distinct from the substantive crime charged in the indictment. The crime of conspiracy was complete once an agreement was made to violate the law and a conspirator performed an overt act in furtherance of that plan. In this case, the jury could have found that Bentivegna's phone call to Warner was an overt act in furtherance of the conspiracy. The fact that the conspiracy may have been unsuccessful does not prevent the Defendants from being convicted. Consequently, the jury verdicts are not inconsistent.

Defendants contend that the Government's argument in rebuttal concerning the failure of the Defendants to call Donald Paule was prejudicial and requires a new trial. The Government made its observation following the arguments of both of the Defendants' counsel to the effect that the jury should infer from the fact that the Government did not call Paule that his testimony would have been favorable to the Defendants. In rebuttal, the Government attorney, after stating to the jury that the Defendants had no obligation to call any witnesses, merely observed that the Defendants were in a position to subpoena Paule. The Court in its charge told the jury that the Government need not produce every witness and that the Defendants were not obliged to present any defense. It is the Court's view that the Government's comment about the availability of witnesses was not prejudicial and does not warrant the grant of a new trial.

The Defendants' final argument is that there was no evidence that Bentivegna conspired with anyone or that he induced fear of economic harm or acted under color of official right. As indicated above, there was evidence from which the jury could have concluded beyond a reasonable doubt that Bentivegna was a member of a conspiracy with Bowers and Paule to extort money from the architectural firm. The evidence also supported the conclusion that an object of the conspiracy was to use Bowers's position as county commissioner to extort the money. In addition, Warner and two of his partners testified that they were apprehensive about the approach by Bentivegna because they feared adverse consequences if they did not make a contribution. There was, therefore, evidence from which the jury could have reasonably concluded beyond a reasonable doubt that Bentivegna conspired to extort money under color of official right or by fear of economic harm.

NOW, THEREFORE, IT IS ORDERED THAT:

The Defendants' motions for judgments of acquittal or for new trials are denied.

MUIR, *U.S. District Judge*

MEMORANDUM OR OPINION OF THE TRIAL COURT EXPRESSED ON THE RECORD

I don't know about the special verdict questions, Your Honor.

THE COURT: All right. Well, I'm going to decline to do it. I think that if the Court of Appeals decides that the York County Democratic Committee should never have been indicted here, then they can really drop this case so we don't try it again. That may be my feeling and they may well see their way clear to do that.

MR. NOLL: I would have the same motion made and understand that the ruling would be the same.

THE COURT: Sure.

MR. NOLL: I would additionally, at this time, Your Honor, renew my motion for judgment of acquittal as provided for in Rule 29(c).

THE COURT: All right. Well, we'll deny that, but you can file some post-trial motions if you wish to do so.

MR. NOLL: Thank you.

THE COURT: Now, this may be new to both of you and that's why I'd rather ask you up here than in open Court. Do you want a pre-sentence conference: Do you know our practice relating to pre-sentence conferences?

PERTINENT NOTES OF TESTIMONY

cash and 5 percent of their fee for the party. Do you have any recollection about any such conversation?

A No, I do not.

Q Did you ever tell him that?

A No, I did not.

Q Did you ever mention that the party wanted a cash contribution from them regarding figures in the nature of $2,000 and 5 percent of the fee?

A No, sir, I did not.

Q You did not?

A No.

Q Is that your testimony?

A Repeat the question.

Q Did you ever tell Charlie Warner that the party needed $2,000 and 5 percent of the contract?

A No, I did not. Never told Charlie that.

Q Did you ever tell him that the party needed any percentage of the contract in order for it to be awarded?

A No.

Q Having known Charles Warner, particularly in the past several years, do you know for a fact that he had been approached by the FBI on many, many occasions, do you know that?

A Yes, I knew that.

Q And having known him for the number of years that you have known him, is it fair to say that when the man gets in a squeeze or in trouble, he's capable of doing or saying anything to get out of it?

A I would say that's a fair statement, yes. I think Mr. Warner's at the stage in life where he's motivated by greed and materialistic things.

Q And if he is threatened by prosecution, of losing his occupation, he'd say anything?

A Yes.

Q Now, according to your testimony today, Mr. Bowers, whatever Warner said about conversations he had with you before the awarding of the contract of January 28, and specifically that you told him you needed $2,000 cash and 5 percent of the contract, that's a lie, wasn't it?

A Yes.

Q Now, the only time, or the first opportunity, or the first occasion that you recall the Committee seeking any type of a contribution from that architectural firm, would have been after the County Commissioners of York announced that that firm was getting it, is that a fair statement?

A Yes, I believe that would be a fair statement.

Q The presentation, according to testimony given, was January 26, 1976. Is that pretty consistent with

VOL. 5. Page 148 and 149
MR. MARTIN/REBUTTAL CLOSING

MR. COSTOPOULOS: I'm sorry, yes. And the Government has gone right back into re-closing and this is improper rebuttal closing.

THE COURT: What's your view?

MR. MARTIN: Your Honor, Mr. Costopoulos suggested that the document itself indicates that it could

have not been made in 1976. I was trying to get to that point by saying, and you referenced these various figures, and I was merely trying to say that the figures were inconsistent.

THE COURT: All right. Well, I did sustain the objection and it seems to me it is not proper rebuttal, so I'll sustain this particular objection presently before the Court.

MR. MARTIN: Yes, Your Honor.

Now, so much for Mr. Bowers. Again, recall what I said about Mr. Bowers. Certainly the two are not as one, but are they that different? Consider all of the testimony of Mr. Bowers, not just his claims that Mr. Warner is a greedy man. Why? Did you get a background for that? Were the facts given to you? Again, consider the similarities. Consider the differences and find out if there isn't closer relationship between the two than Mr. Costopoulos suggested.

Now, the third thing he raised was the business of Mr. Paul, the unknown person or the absent person here in the Court room. Mr. Paule is not a Defendant. There's no reason for him to be here.

Now, with respect to what can go on at a trial, the Government does not have any obligation to bring every conceivable witness to prove anything. The Government has to demonstrate to you beyond a reasonable doubt, of course, all the elements of the crime, but the Government has no obligation to bring everyone into the Court room.

Now, back up a bit. The defense, of course, has no obligation to put on any defense whatsoever. But, Mr. Bentivegna took the stand. Both sides, the Government and the defense have subpoena power. They can require people to come in and testify.

MR. COSTOPOULOS: Your Honor, I am objecting to that reference to the defense having any subpoena power in light of the defense's right not to present any

evidence whatsoever, and I think the Government is getting perilously close to an improper prejudicial statement before this jury.

MR. MARTIN: I believe it's a fair statement of the law and coupled with the fact that I indicated that they have no obligation to use that power, there is nothing improper in it at all.

THE COURT: We'll overrule the objection.

MR. MARTIN: As I said, both sides have an opportunity to subpoena people. Mr. Costopoulos said you must infer from Mr. Paule's absence that he would have

Vol. 5, Page 229 through 235
MR. COSTOPOULOS AT SIDEBAR

conspiracy?

MR. WOLFE: Guilty.

THE COURT: Very well.

Yes, sir?

MR. COSTOPOULOS: May we approach the bench?

THE COURT: Yes, sir.

(At sidebar)

MR. COSTOPOULOS: May it please the Court, on behalf of Jack Bentivegna, I am satisfied with the Court's poll of the jury. At this time, however, because of the co-conspiratorial admissions that have been admitted into evidence and a charge of the Court given to this jury that they could only use admissions of certain unindicted co-conspirators, if they found that there was a conspiracy. I, on behalf of Jack Bentivegna, do not know who this jury concluded Mr. Jack Bentivegna conspired with. It is possible, Your Honor, this jury individually and/or collectively will indicate to the Court that the only person or entity Jack Bentivegna

conspired with was the York County Democratic Committee. On appeal, should the Committee be excluded as a Defendant for any reason, unless we have that indication from the jury on the record, we may be in a position with the jury has found a man guilty of conspiracy for having conspired with himself.

In addition, the jury may conclude that Jack Bentivegna conspired with an unindicted co-conspirator which would forever foreclose that appellate problem that we may have to face.

THE COURT: Which would forever what?

MR. COSTOPOULOS: Foreclose the appellate problem I anticipate happening in the future. For example, Judge, if on appeal the Third Circuit says the York County Democratic Committee should never have been indicted, for whatever reason, then what we have on the record is a conspiracy conviction not knowing whether Jack Bentivegna was found to have conspired with the Committee alone or with the unindicted co-conspirator, Don Paule, and/or the unindicted co-conspirator, Bob Bowers. For that reason, we can do it individually, sequestering the other eleven would be my request, to ask these jurors the following question: With whom did Jack Bentivegna conspire in this case. And whatever answer they give, of course, is the final word in this matter and I would have no further requests.

MR. MARTIN: Your Honor, I object to that simply because we are into the area of special verdict questions for the jury. Your Honor's charge indicated that the conspiracy would have to exist between two people, and Your Honor also referenced that the York County Democratic Committee was an unincorporated association. It could only act through individuals. And I think, first of all, the time to have brought up this problem was – if at all –was in the instructions to the jury and it certainly is not at this point a proper thing to have special verdict questions of the jury in this regard.

I think Mr. Costopoulos's request should be denied.

THE COURT: I'm not aware that we can ask them any special verdict questions which this really amounts to. I have never known of it being done. It seems to me I saw something relating to this in the last six months, but I believe that if it was done, it was something done at the outset of the jury deliberation and not coming in at this juncture. And I really don't think we have the power to do it. Now, do you know of anything which would give us the power to do this?

MR. COSTOPOULOS: I cannot cite to this Court a case, but the problem as I see it, Judge, is, suppose on appeal the Third Circuit says the York County Democratic Committee should never have been indicted. We don't know what transpired in that jury room. We have invested, I don't know how many days in this trial –

THE COURT: Five.

MR. COSTOPOULOS: Five. The jurors may indeed say that he conspired with all of the named conspirators indicted, and unindicted, in the indictment and it would be a proper verdict. But if this jury answers individually and/or collectively, that they found that he conspired with the Committee, and the Third Circuit says the Committee should not have been indicted, then Jack Bentivegna's conviction, of course, must fall and it is unique, but so was the indictment of the Committee.

THE COURT: I am not saying we are going to do this, but I would be more inclined to ask them this question: Did Mr. Bentivegna conspire with anybody other than the York County Democratic Committee? If they say yes, so be it. If they say no, then you've got a conspiracy, perhaps, with himself, but that bothers me because even that question is somewhat flawed because he could have conspired with somebody as agent for the Committee, I believe, and then they would give us– they might answer that question, he conspired with the Committee, thinking that if he conspired with an agent of the Committee, that's good enough.

I'm very much troubled by it.

MR. COSTOPOULOS: I do think the Court can ask a structured question that can be answered with a yes or no, as the Court is attempting to do. And I do think we're moving in the right direction, Judge, with that. The Court may ask, did Jack Bentivegna conspire with unindicted co-conspirator Don Paule and/or Robert Bowers?

THE COURT: Well, is there anybody else he could have conspired with?

MR. COSTOUPOLOS: The only other person he could have conspired with would have been on the face of the indictment, the Committee or its agents. The indictment simply names those two unindicted co-conspirators, and the Committee. And if you would ask that leading question, which I am not objecting to at all, because I can appreciate the Court's sensitivity in this area, I do think the record will be complete in the eventuality the Committee is ultimately exonerated.

THE COURT: Well, there's a possibility we could send out a special verdict question with them, or to them, which would require all these signatures. Of course, it's now midnight. I'm reluctant to try to do that at this late hour and I somewhat hate to have them come back tomorrow when I think they have served here, trying to reach a verdict to dispose of this matter tonight.

Do you know anything about the law in this field, Mr. Martin?

MR. MARTIN: No, Your Honor, but again, the Government – this is no surprise thing that has arisen. This is something that could have been anticipated and now, after the verdict comes in, that I believe is the wrong time to be raising the problem. It should have been raised before the jury went out. Clarification of the jury instructions or some other manner – at this time, I don't think it's proper to – the juror's thoughts on this matter, and I'm afraid I don't know about the special verdict questions, Your Honor.

THE COURT: All right. Well, I'm going to decline to do it. I think that if the Court of Appeals decides that the York County Democratic Committee should never have been indicted here, then they can really drop this case so we don't try it again. That may be my feeling and they may well see their way clear to do that.

MR. NOLL: I would have the same motion made and understand that the ruling would be the same.

THE COURT: Sure.

MR. NOLL: I would additionally, at this time, Your Honor, renew my motion for judgment of acquittal as provided for in Rule 29(c).

THE COURT: All right. Well, we'll deny that, but you can file some post-trial motions if you wish to do so.

MR. NOLL: Thank you.

THE COURT: Now, this may be new to both of you and that's why I'd rather ask you up here than in open court. Do you want a pre-sentence conference? Do you know our practice relating to pre-sentence conferences?